Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

REPLY COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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1. Introduction and Summary

In its initial Comments, ITTA discussed three major issues affecting the appropriate regulatory treatment of IP-enabled services.

First, ITTA addressed the public interest in securing adequate financial resources to support the maintenance and enhancement of the public switched telecommunications network (PSTN), concurring with the Commission's view that "the cost of the PSTN should be borne equitably among those that use it in similar ways."[1]

Second, ITTA's Comments pointed out that neither legal precedent nor consumer welfare supports the imposition of economic regulation upon midsize companies in their provisioning of IP-enabled services.

Third, ITTA supported the Commission's distinction between economic regulation and public interest regulation (embodying specific social policy concerns such as E911, law enforcement, universal service, and related issues) and urged symmetrical application of public interest regulation upon all similarly situated service providers, regardless of the technology employed. ITTA noted that the failure to symmetrically

[1] *In the Matter of IP-Enabled Services,* Notice of Proposed Rulemaking, WC Docket No.04-36, FCC 04-28 (rel. March 10, 2004) ("Notice") at ¶ 61.

spread this burden among all service providers directly harms both consumers, who may be deprived of the benefits of these critical services, and competition, by conferring artificial cost advantages on some service providers at the expense of others.

Other parties also addressed these points in some of the 132 submissions filed in the initial comment round.[2] Not surprisingly, the perspectives apparent in those submissions vary considerably, hampering consistent comparison of party positions on these topics. In this Reply, ITTA responds on behalf of its midsize company members[3] to those initial comments by addressing them in terms of the following four propositions:

- Legal and policy considerations support the uniform application of public interest regulation on all service providers touching the PSTN;
- Legal and policy considerations do not support the economic regulation of midsize company IP-enabled service offerings;
- Federal preemption may be necessary to forestall state-imposed economic regulation, in order to achieve congressional goals for consumers of IP-enabled services;
- Arguments in the comments against federal preemption are flawed and should not deter FCC preemption where appropriate.

ITTA's discussion of these positions comports with the Commission's primary purpose of "examin[ing] what its role should be in this new environment of increased consumer choice and power, and…whether it can best meet its role of safeguarding the public interest by continuing its established policy of minimal regulation of the Internet and the services provided over it."[4] For the reasons set out below, ITTA respectfully requests Commission consideration of its positions and adoption of conforming policies that make "minimal regulation" the primary tool for achieving timely realization of the vast consumer potential inherent in IP-based networks and services.

[2] References herein are to Comments filed on May 28, 2004 in response to the Notice in this proceeding.
[3] ITTA represents the legislative and regulatory interests of its membership, comprising 12 incumbent local exchange carriers serving more than 10,000,000 access lines throughout the country.
[4] Notice at ¶ 2 (citations omitted).

2. Legal and policy considerations support the uniform application of public interest regulation on all IP providers touching the PSTN.

At the outset of the Notice, the Commission carefully acknowledged the distinction between economic regulation and public interest regulation:

> [M]uch of the telecommunications regulation implemented by the Commission had its roots in seeking to control monopoly ownership of the PSTN. To the extent the market for IP-enabled services is not characterized by such monopoly conditions, we seek comment on whether there is a compelling rational for applying traditional economic regulation to providers of IP-enabled services….[O]ther aspects of the existing regulatory framework – including those provisions designed to ensure disability access, consumer protection, emergency 911 service, law enforcement access…consumer privacy, and others – should continue to have relevance as communications migrate to IP-enabled services.[5]

The dichotomy observed by the Commission proceeds from the differing origins and purposes of each type of regulation. These differences profoundly affect the scope and applicability of each type of regulation to a post-PSTN, IP-enabled environment.

Unlike economic regulation, public interest regulation reflects the considered judgment of Congress on specific social policy issues,[6] distilled into specific statutes which address such matters as:

- Access to emergency 911 services[7]
- Access by those with disabilities[8]
- Consumer protection and privacy[9]
- Support for law enforcement and public safety[10]
- Universal service[11]

[5] Notice ¶ 5.
[6] *See* Notice ¶ 36, wherein the Commission parenthetically identifies as "social policy concerns" matters "relating to emergency services, law enforcement, access by individuals with disabilities, consumer protection, universal service and so forth…."
[7] 47 U.S.C.§615.
[8] 47 U.S.C. §225.
[9] 47 U.S.C. §222.
[10] 47 U.S.C. §1001 *et seq.*
[11] 47 U.S.C. §254.

Congress reemphasized the importance of these public interest obligations in the 1996 Act, mirroring them as exemptions to the general prohibition against state restrictions on telecommunications services:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[12]

Collectively, these statues establish responsibilities for consumer welfare and place requirements on communications carriers, or infrastructure, or both, in order to promote the public interest. Historically, these obligations were placed on the PSTN (and, in incremental fashion over time, those interfacing with the PSTN) as the only ubiquitous network essentially serving all consumers.

Multiple comments noted the importance of extending these obligations to all service providers using the PSTN to secure congressional goals and to avoid consumer harm. As the National Association of State Utility Consumer Advocates observed:

> Ensuring that the general public, including both residential and small business customers, has ready access to affordable, reliable, high quality voice telecommunications service is essential to our society, the economy and, now more than ever, the public safety. This is true regardless of the technology used to provide the service.[13]

This is especially the case, as ITTA noted in its Comments, with respect to those consumers in rural and small-town America who rely now (and will rely for some time to come) on the PSTN as their primary means for securing these benefits.

The comments also support the position that symmetrical application of these public interest obligations on all communications service providers touching the PSTN is

[12] 47 U.S.C. §253(b).
[13] Comments of the National Association of State Utility Consumer Advocates at 5.

essential to maintaining competitive neutrality in the already competitive marketplace for IP-enabled services. The Minnesota Commission comments present a capsule study of the harm issuing from asymmetrically applied public interest regulation:

> Vonage [an IP-based service provider] currently avoids paying access charges otherwise assessed on carriers interconnecting with the PSTN, shifting a greater share of the costs of the network to PSTN customers….Vonage also avoids contributing to the federal universal service program. The Court's decision [[14]] exempts Vonage from state requirements for making E911 available, raising serious public safety concerns. Under the Court's decision, Vonage would likewise be exempt from having to make its service available to the disabled….[P]roviders offering IP-enabled services that use the PSTN should have similar obligations towards universal service, service quality, consumer protection, and public safety as do their competitors and other users of the PSTN.[15]

Having made substantial investments to maintain and enhance their own networks, midsize companies well know that fulfilling public interest regulatory requirements is neither easy nor cheap. It is no wonder then that non-incumbents, tempted by competitive pressure to cut costs, may respond by cutting corners on their public interest obligations, with the goal of shifting the cost burden to others (including their competitors).

In this regard, ITTA again notes the importance of ensuring adequate financial resources for the maintenance and enhancement of the PSTN. Particularly where access charges (interstate and intrastate) are evaded, the cost of the PSTN is not "borne equitably among those that use it in similar ways"[16] and consumers are not assured of obtaining the intended benefits of public interest regulation.

The congressional mandate for a broad application of public interest regulation, including to appropriate IP-based service providers, is clear. If the responsibilities and

[14] *Vonage Holdings Corp. v. Minnesota Public Utilities Commission et al*., Civil No. 03-5287 (D.C. Minn. 2003).
[15] Comments of the Minnesota Public Utilities Commission at 3, 9.
[16] Notice at ¶ 61.

burdens of public interest regulation are not fairly spread over all service providers touching the PSTN, undesirable results will occur. Some consumers will be deprived of necessary services and benefits, potentially at their peril. And some competitors will obtain uneconomic, unjust advantages over other competitors, to the detriment of competition generally. ITTA urges the Commission to avoid these consequences by adopting rules to extend the intended protections of public interest regulation to all consumers, regardless of the provider or the technology serving them.

3. Legal and policy considerations do not support imposition of economic regulation on incumbent IP-enabled service offerings.

If the case for imposing public interest regulation seems fairly clear, the case for imposing economic regulation seems particularly obscure.

Economic regulation does not stand on the same express statutory footing that underpins public interest regulation. Far from being the object of specific congressional enactments, dominant carrier regulation is largely a regulatory construct, arising from periodic precedents, and erected on a three-legged factual stool consisting of monopoly ownership, of bottleneck facilities, as to which consumers lack alternatives or the power to influence the terms of service.[17] To the extent is has spoken, Congress (at least since 1996) has favored elevating the operations of markets over the operations of commissions. It has expressly promoted economic deregulation, believing this approach most likely "to accelerate rapidly private sector deployment of advanced telecommunications and information services,"[18] of which IP-enabled services are a part. Those favoring the imposition of economic regulation, thus, do not inherit a case. They must build one.

[17] Notice ¶¶ 36, 37, and 74.
[18] Preamble, CONFERENCE REPORT (S. 652), January 31, 1996.

The facts under the three-legged stool test are unhelpful to that effort. As the Commission has previously found and the D.C. Circuit has recently recited,[19] 90% of the U.S. population lives in areas served by at least three wireless providers. 40% of Americans and 61% of American households own a wireless phone. 3-5% of wireless customers use wireless as their only phone, treating it as a full substitute for traditional land line service. Further, as intermodal alternatives expand in the marketplace, traditional connections to the PSTN contract. Recent reports indicate that incumbent carrier access lines declined from 187 million in 2000 to 172 million in 2002, a decline of about 8%.[20] Interstate switched access minutes declined from 538.3 billion minutes in 2001 to 486.0 billion minutes in 2002, a decline of approximately 10%.[21] These facts do not make out a case for bottleneck facilities.

With respect to consumer choice of services and service providers, the Notice acknowledges the fact that multiple IP-enabled service offerings already pervade the marketplace. The Notice characterizes these offerings as a "dizzying array" of "attractive alternative[s] to consumers," available to them via "hundreds of thousands of networks, owned and operated by hundreds of thousands of people."[22] Major non-incumbent companies are entering or have already entered the IP-enabled voice market, including AT&T, Time Warner, Comcast, Cox Cable and Cablevision.[23] Smaller but aggressive

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[19] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338 et al. FCC 03-36, 18 FCC Rcd 16978 (August 31, 2003) at ¶ 53, recited in *USTA v. FCC*, No. 00-1012 (D.C. Cir. 2004)("*USTA*") at 30.
[20] CNET News.com, "Phone fray attracts cable industry" (June 21, 2004) (http://nes.com/Phone+fray+attracts+new+competitor:+cable/) at 1.
[21] Notice n.11.
[22] *See* Notice ¶¶ 1, 5, 9, n.13 and n.23.
[23] Wired News, "VoIP: Here, There, Everywhere" (December 12, 2003) (http://www.wired.com/news/infostructure/0,1377,61551,00.html) at 1.

companies, such as Vonage and VoicePulse, already provide IP-enabled service in multiple areas of the country. This activity has moved one analyst to observe:

> I think that 2004 is going to be the most interesting year in telecom in quite a while. We're going to see companies going out and advertising the fact that your phone service doesn't have to come from the phone company any more….The pricing structure for voice communications is going to take a turn to the logical. All of the variants of the past – with local, regional and long-distance calls – are going to go away. It's going to be more simple, with a flat fee for all calls.[24]

These facts do not make out a case for constrained consumer alternatives or lack of consumer influence upon pricing.

Rather, the available facts make the opposite case: the conditions of monopoly facilities and markets which justified historical dominant regulation are absent from the IP-based marketplace. Absent factual legs, the three-legged stool upon which the imposition of economic regulation rests must collapse. The Notice concludes as much:

> We believe…that traditional economic regulation designed for the legacy network should not apply outside the context of the PSTN, and therefore will be inapplicable in the case of most IP-enabled services.[25]

ITTA concurs. There is no factual basis for imposing dominant economic regulation in the IP marketplace.

Nonetheless, some comments appear to support the imposition of economic regulation on IP-based services or service providers. The Comments of the Ohio Public Utilities Commission, for example, expressly seek to apply extant regulation to VoIP services, promising a "'light touch' or minimal oversight," but only in conformity with "the longstanding practice with other competitive or non-dominant providers of

[24] *Id*., quoting Boyd Peterson of the Yankee Group, at 1-2.
[25] Notice ¶ 36 and n.116.

telecommunications in Ohio."[26] Another state comment proposes the imposition of legacy regulation through the retrospective reclassification of DSL out from under exclusive federal authority.[27] The NASUCA Comments offer the typical justification for imposing economic regulation on incumbent IP-based offerings:[28]

> Most ILECs operate under rate of return or price cap regulatory regimes that have been in existence for decades. These regimes largely recognize the dominance of ILECs in their local exchange markets. Some smaller and rural ILECs remain local service monopolists….The Commission should not adopt any rules that would exempt dominant ILECs from the applicable regulations simply because they migrate to VoIP. This Commission and state commissions should ensure that monopolist and dominant ILECs remain subject to economic regulation.[29]

Other state comments, in various ways, also appear to urge or to admit of economic regulation for historically incumbent or dominant carriers, only, in an IP environment.[30]

That ILECs have operated under stringent regulatory regimes in the past is not, of course, a sufficient reason to subject them to such regimes in the currently changed environment. The basic assertion that "we have always done it this way" has no independent legal or policy weight – a point implicitly acknowledged in the Notice discussion of the dichotomy between economic regulation and public interest regulation. The legacy regimes of the past existed because of the factual conditions of the past. If new conditions exist, then new structures and new regimes are required.

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[26] Comments of the Public Utilities Commission of Ohio at 5 (emphasis added). See also the Comments of the Arizona Corporation Commission at 13: "The regulations of many state commissions, including Arizona, for competitive carriers are already quite relaxed and do not at all resemble the regulations applicable to the monopoly incumbent wireline providers in the state." [Emphasis added].

[27] Comments of the Arizona Corporation Commission at 11: "Given the changing nature of this traffic as VoIP services evolve, classification of DSL as an interstate telecommunications service is no longer appropriate." [Emphasis in the original; citations omitted].

[28] ITTA acknowledges that the substantial bulk of NASUCA's Comments address the previous topic of public interest regulation. ITTA agrees with a number of NASUCA's concerns for the full and fair imposition of public interest obligations on all VoIP providers, e.g., "VoIP providers that utilize the PSTN should have the same obligations as other carriers using the PSTN" (at 3).

[29] Comments of the National Association of State Utility Consumer Advocates at 37-38.

[30] *See* the discussion and citations in section 5 of this Reply, *infra.*

The facts adduced above, the data being continually gathered in other Commission proceedings, and the very existence of this proceeding demonstrate that new circumstances are indeed present. Alternatives to the local loop abound, given the widespread availability of wireless, cable, and satellite facilities. Moreover, the 1996 Act prohibition on *de jure* monopolies,[31] the forced access to incumbent networks,[32] and the multiple consumer alternatives to incumbent carriers in terms of competitive services and intermodal facilities described above have not "been in existence for decades." These are subsequent developments which remove the factual premises underpinning traditional economic regulation. In the interests of sound public policy and lawful regulation, these changes ought not to be ignored by the reflexive application of legacy regulation.[33]

Accordingly, ITTA respectfully urges against a rear-view mirror approach that would impose economic regulation on IP-enabled services. The future is before us, not behind us. The regulatory reluctance to abandon regulatory intervention articulated in some of the comments merely confirms one of the earliest observations of Chairman Powell about regulatory persistence:

> The 1996 Act commands policymakers and industry to move away from the monopoly-oriented, over-regulatory origins of communications policy and toward a world in which the market, rather than bureaucracy, determines how communications resources should be utilized. Yet, so often, we cannot actually bring ourselves to let go, to jump off our regulatory perch.[34]

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[31] 47 U.S.C. §253(a).
[32] 47 U.S.C. §251(c).
[33] *See, e.g.*, *USTA* at 25:

> Whether the weight the FCC assigns to this factor [intermodal alternatives] is reasonable in a given context is an [sic] question that we need not decide, except insofar as we reaffirm *USTA I*'s holding that the Commission cannot ignore intermodal alternatives.[Emphasis added.]

[34] Michael K. Powell, Commissioner, FCC, *Working Toward Independents' Day: Mid-Size Carriers as the Special Forces of Deregulation,* Remarks, Independent Telephone Pioneer Association, Washington, D.C. (May 7, 1998).

Given the initially deregulated condition of most IP-based services, a better metaphor might be to stay on the perch and not jump into IP-based markets. Either way, the Chairman's policy insight remains the relevant and appropriate one for determining these issues in this proceeding.

4. Federal preemption may be necessary to forestall state-imposed economic regulation, in order to achieve congressional goals for consumers of IP-enabled services

Congress has been quite clear about its policy with respect to regulating the Internet and IP services. It disfavors regulation.

> It is the policy of the United States – …
> (2) to preserve the vibrant and competitive market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation….[35]

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment…of advanced telecommunications capability to all Americans…by utilizing… regulatory forbearance….[36]

These pronouncements are part of the general congressional policy favoring deregulation of all communications services and markets, a prime objective of the 1996 Act.[37] Congress could not be clearer in expressing its desire that the evolution of advanced IP services and facilities should proceed in response to market and consumer preferences, rather than regulatory ones.

When contrasted with these clear pronouncements, the drift of state regulatory comments in this proceeding should be of concern to the Commission and to consumers,

[35] 47 U.S.C. §230(b).
[36] Telecommunications Act of 1996 §706 (unincorporated).
[37] Telecommunications Act of 1996: "AN ACT To promote competition and reduce regulation in order to…encourage the rapid deployment of new telecommunications technologies." See also Preamble, CONFERENCE REPORT (S. 652), January 31, 1996: "…to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services…."

as well. In the multiple instances cited above and hereafter, state after state has hinted at or proposed extending the grip of economic regulation to IP-enabled services or service providers. An unarticulated premise for this approach seems to be that regulators can as easily (or perhaps better) determine consumer desires and needs than the consumers themselves:

> It bears emphasis, however, that as a practical matter, residential customers are highly unlikely to choose this option….[I]t is reasonable to assume that a vast majority of residential customers using voice service over IP will choose an area code….[I]t is reasonable to assume that the vast majority of residential and small business customers will use voice over IP….[T]hrough the use of proxies….[38]

Where their own dollars are concerned, consumers are actually pretty smart. Regulatory assumptions and proxies are unnecessary where markets are left free to respond to the directly expressed demands of consumers themselves.

In making this point, ITTA continues to distinguish between public interest regulation – which Congress has legislatively established, *supra* -- and economic regulation – which Congress has legislatively decried. ITTA readily acknowledges the good faith of regulators seeking the appropriate approach to regulation in the IP era. But Congress has already considered the effects of such regulation on the Internet and advanced services, and has come down against it. It is because of this non-interventionist policy that consumers presently enjoy "a dizzying array of IP-enabled services," services which owe their development to private sector initiative and not to governmental regulation.[39]

This leaves the Commission with the serious but unavoidable responsibility for carrying out the clear deregulatory intentions of Congress with respect to IP-enabled

[38] Comments of the People of the State of California and the California Public Utilities Commission at 36-37.
[39] Notice at n.13.

services. Undoubtedly, the collaborative process upon which the Commission has embarked in this and other proceedings is the correct initial approach. But if the Internet is a global network, then a global perspective must be maintained by someone. The ultimate goal – letting consumers across the nation decide for themselves in open markets what they want – requires the Commission's best efforts to transcend the limitations of the past. Given the attitudes reflected in the comments, those efforts may ultimately require exercise of its preemptive powers under statutory and constitutional law.[40]

5. Arguments in the comments against preemption are flawed and should not deter FCC preemption where warranted.

Perhaps anticipating the eventuality of preemption, some commenting parties argue against the availability or the exercise of this power by the Commission in this proceeding. An extended analysis of the constitutional law and precedent applicable to this complex issue is impracticable here, particularly with respect the lengthy, fact-specific jurisprudence attending the scope of §2(b) of the 1934 Act.[41] Nonetheless, ITTA believes it useful to identify and to briefly discuss some of the arguments raised in the comments, in order to show that none should deter the Commission from exercising preemption where the circumstances warrant.

a. General "cooperative federalism" and "partnership" arguments.

Various parties suggest that the Commission cannot or should not exercise its preemptive powers because applicable law and precedent either require coordinated federal-state action or make unilateral federal action unlawful. The Nebraska Public

[40] ITTA stresses that federal preemption power must be exercised in a manner consistent with the public interest regulation discussed, *supra.* This is especially true with respect to access charges (both interstate and intrastate) through which "the cost of the PSTN" is significantly, if not uniformly, recovered at present.
[41] 47 U.S.C. § 152(b). Although foregoing a discussion of these matters in this Reply, ITTA affirms that preemption could be exercised in a manner consistent with the requirements of that statutory provision.

Service Commission, for example, asserts that "Congress envisioned a federal-state partnership to carry out the goals of the 1996 Act."[42] In the view of the Iowa Commission, "The concept of 'cooperative federalism' has been a central tenant of the dual regulatory scheme over telecommunications services set up by the Telecommunications Act."[43] The California Public Utilities Commission supports a joint venture approach to regulation by pointing to the several places in the 1996 Act where Congress "reaffirmed its intent that the states, as well as the FCC, are charged with effectuating the Act's purposes."[44] NARUC adopts a similar recitation of statutory references in support of its position that "Congress's intent to preserve State authority is repeatedly emphasized."[45]

A dual regulatory scheme does not equate to a partnership of equals, equally competent as to all matters. Discrete statutory assignments of authority to the states cannot be transmogrified into an undifferentiated, fungible pool of shared federal powers. As the D.C. Circuit court recently observed:

> There is no presumption covering delegations to outside parties [i.e., state commissions]. Indeed, if anything, the case law strongly suggests that sub delegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization….[D]elegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," [citation omitted] and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.[46]

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[42] Comments of the Nebraska Public Service Commission at 7.
[43] Comments of the Iowa Utilities Board at 3.
[44] Comments of the People of the State of California and the California Public Utilities Commission at 17: "Those provisions include §§ 254(b)(5) & (f) & (h) & (k) governing universal service, § 225(b)(1) governing access by the hearing and speech impaired to voice transmission service; and § 615 governing access to emergency services. Congress further provided in section 706(a) that both the FCC and the states would encourage the deployment of new technologies and services." [Citations omitted].
[45] Comments of the National Association of Regulatory Utility Commissioners at n.25.
[46] *USTA* at 14.

The Court, further, took note of the specific grants of power to states in the 1996 Act – of the kind noted in the state comments above – and stated:

> [T]he fact that other provisions of the statute carefully delineate a particular role for the state commissions, but §251(d)(2) does not, reassures us that our result [finding against general delegations of authority to the states] is consistent with congressional intent.[47]

Put differently, the Court was observing that the 1996 Act assignment of specific powers to the states tends to reinforce the view that a general assignment of power to the states is absent. Consequently, a federal-state partnership may exist, but the powers of the partners are discrete and one of the partners must be -- and is -- superior to the other.

b. "Proximity" arguments.

Some states argue that state commission regulation is necessary in the IP arena, given that states are more familiar with local circumstances, conditions, and consumer needs than the Commission in Washington, D.C. The Nebraska Commission, for example, asserts:

> Because of the close proximity to the end-user, state commissions are in a suitable position to determine whether or not an IP-Enabled [sic] service is being offered as a replacement service for POTS. The NPSC urges against a Commission finding that one or more classes of IP enabled services is subject to *exclusive* federal jurisdiction.[48]

But in its Comments, USTA reviewed the basis and consequences of the Commission's decisions in the pulver.com[49] and GTE Tariff[50] cases. Its analysis demonstrated that as a

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[47] *Id.* at 18.
[48] Comments of the Nebraska Public Service Commission at 2 (emphasis in the original). *See also* the Comments of the Arizona Corporation Commission at 2, which refer to "the states' proximity to the markets it regulates and its consumers."
[49] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service,* Memorandum Opinion and Order, WC No. 03-45 (rel. February 19, 2004)("pulver.com").
[50] *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No.1, GTOC Transmittal No. 1148,* Memorandum Opinion and Order, CC Docket No. 98-79, 13 FCC Rcd 22466 (1998) ("GTE Tariff Order").

matter of established precedent many IP services will fall legally within the exclusive jurisdiction of the Commission.[51]

More broadly, arguments based on local presence are but a subset of the argument that consumers and service providers, being locally located, are subject to local jurisdiction and rather than federal. This argument has long been rejected by the U.S. Supreme Court as antithetical to federalism under the interstate commerce clause.[52] There is little "local" in an Internet and IP-enabled universe that is global in scope, comprised of hundreds of thousands of networks, and owned and operated by hundreds of thousands of people. The proximity argument peers through the wrong end of the telescope.

c. §160 arguments.

Section 10 of the 1996 Act establishes the Commission's power and duty to forbear from applying "any regulation or any provision" of the Act under defined conditions. As a significant consequence of Commission forbearance, a state commission may not continue to apply or enforce any provision of the Act that the Commission has determined to forbear from applying.[53] The Minnesota Commission, however, asserts:

> [I]n its Report to Congress, the FCC clarified that forbearance by the FCC precludes a state from applying or enforcing a provision of federal law, but it does not preclude a state from imposing requirements derived from state law.[54]

[51] Comments of the United States Telecom Association at 34-36.
[52] *See, e.g.*, *Wickard v.Filburn*, 317 U.S. 111, 128 (1942), upholding federal penalties on a farmer raising wheat for his own consumption on the grounds that such wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in [interstate] commerce." So also, with 'home-grown' communications.
[53] 47 U.S.C. § 160(e).
[54] Comments of the Minnesota Public Utilities Commission at 10, citing *In the Matter of Federal-State Joint Board on Universal Service,* Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501 ("*Stevens Report*") at ¶ 48.

This seems to imply that notwithstanding federal preemption of a matter via forbearance, state regulatory power (including economic regulation) could still be exercised under state law.

The Commission's statement is a fair summary of paragraph 48 of the *Stevens Report* (upon which it relies), but fails to discuss footnote 101 incorporated within that paragraph. Footnote 101 recites that, notwithstanding the possibility of state action under state law, "The Commission has preempted certain inconsistent state regulation of jurisdictionally mixed enhanced services provided by the BOCs."[55] It is true that the footnote 101 preemption applied to mixed services and not to "state regulation of telecommunications services." Even so, federal preemptive powers were exercised. And this preemption of "inconsistent" state regulation, antedating adoption of the 1996 Act by five years, occurred without the benefit of Section 253 of the Act.

Under Section 253(a), any matter forborne by the Commission but reasserted under state law would have to pass muster under the statutory test proscribing state statutes, regulations, and requirements which "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[56] An incumbent carrier qualifies as an "entity." The imposition of economic regulation on an incumbent's IP-enabled services (assuming they are telecommunications services) could certainly have the proscribed inhibiting effect, especially in light of the Commission's antecedent and underlying forbearance determination. Since Sections 253(a) and (d) now extend federal preemptive power to "telecommunications service," the basis for the Minnesota Commission's argument of

[55] *Stevens Report* n.101.
[56] 47 U.S.C. § 253(a).

independent state authority under state law is largely undercut.[57] Further, Section 253(b) provides no relief here since, as discussed earlier, this subsection comprehends only public interest regulation (universal service, E911, etc.) and not economic regulation.

d. § 230(b) arguments.

ITTA cites above the provisions of Section 230(b) to support its view that congressional policy stands opposed to federal and state regulation of the Internet and other interactive computer services. The New York State Department of Public Service takes a contrary view:

> As the Supreme Court stated, "the words of a statute must be read in their context and with a view to their place in the statutory scheme."[citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)]. When read in context, it is clear that Section 230 is meant to address law and regulation concerning the content of speech transmitted over the Internet, rather than states' application of traditional common carrier regulation.[58]

The New York State Department then cites *Batzel v. Smith*, a 9th Circuit case,[59] for the proposition that Congress' purpose in adopting Section 230 was to encourage free speech on the Internet, to promote e-commerce, and to encourage voluntary monitoring for obscene and offensive content. In consequence, according to the New York State Department, "Section 230 cannot be read to alter jurisdiction over intrastate communications merely because the provider is using IP technology."[60]

ITTA has not argued that Section 230(b) represents positive law with direct impacts on jurisdictional issues. (Sections 160, 253(d), and 254(f) are examples of sections which do have such an impact.) ITTA has argued, rather, that Section 230(b) is

[57] ITTA's argument here is separate from the more general federal preemption powers available to nullify "inconsistent state regulation" as described in footnote 101.
[58] Introduction and Summary [New York State Department of Public Service] at 7.
[59] 333 F. 3d 1018 (9th Cir. 2003).
[60] Introduction and Summary [New York State Department of Public Service] at 7-8.

important for its clearly expressed congressional desire that the IP-based marketplace evolve and expand "unfettered by Federal and State regulation." This statement is expressly declared to be "the policy of the United States," irrespective of other purposes attending the statute. Questions concerning congressional intent abound in the comments; Section 230(b) provides a clear and unequivocal answer, disfavoring regulation in IP matters. It remains for the Commission to carry out that intent -- where necessary through the use of preemption.

e. §253 arguments.

Several state commissions cite Section 253(b) as an indication that Congress intended to preserve state powers from federal preemption.[61] As ITTA has discussed above, the exceptions provided in subsection (b) – for universal service, public safety and welfare, quality of consumer services, and consumer protection – parallel the positive statutes which underlie public interest regulation.[62] ITTA reaffirms that public interest regulation can involve the exercise of state authority and has urged that that authority be used to apply public interest burdens fully and fairly to all service providers utilizing or touching the PSTN.

But, continuing the parallelism, neither the public interest statutes nor the carve-outs in subsection (b) identify economic regulation as a preserved area of state authority. As argued above in the Section 160 and 230(b) contexts, state economic regulation enjoys no expressed protection in 253(b) and thus remains subject to federal preemption.

[61] *See* Comments of the Minnesota Public Utilities Commission at 10; Comments of the People of the State of California and the California Public Utilities Commission at 31-32, n.65; Comments of the Nebraska Public Service Commission at 7.
[62] *See* notes 7–12 and related text, *supra.*

Assuming further for purposes of analysis that economic regulation did fall within the protection of subsection (b), such regulation would have to be applied "on a competitively neutral basis." Economic regulation applied to only one set of service providers is not competitively neutral. Such regulation would produce (or exacerbate) distortions in competitive markets of the kind discussed earlier in this Reply. Selective economic regulation of IP-enabled services would merely transpose the current asymmetry in basic telecommunications services to the IP universe – but without the antecedent foundation of "monopoly," "bottleneck facilities," etc., used to justify current economic regulation in the legacy environment. Lacking competitive neutrality, such an imposition would contravene the prohibitions of subsection (a) of Section 253 and thus trigger the separate preemptive powers in subsection (d).

f. §601 (unincorporated) arguments.

The Ohio Commission asserts that any attempt at federal preemption "would directly violate §601 [unincorporated] of the 1996 Act,"[63] which states:

> (1) NO IMPLIED EFFECT. -- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

As the title of this subsection suggests, this provision amounts to a savings clause intended to embody the general rule that legislative repeals by implication are disfavored. But even on its face, this section admits of the possibility that other sections of the Act may expressly "modify, impair or supersede" state law. An example of such is Section 261(b):

> (b) EXISTING STATE REGULATIONS. – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing

[63] Comments of the Public Utilities Commission of Ohio at 23.

> regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part. [Emphasis added].

The catch is apparent: if the Ohio Commission adopts a regulation in fact inconsistent with the Act, the recited statutory provisions combined would authorize corrective measures such as federal preemption to the extent justified by the circumstances. These provisions neither create nor guarantee the exercise of state regulatory power in any particular case. They merely preserve existing conditions against implicit (but not explicit) modification and subject them to the limitation of consistency with the Act, a matter in the first instance for Commission and court determination.

* * * *

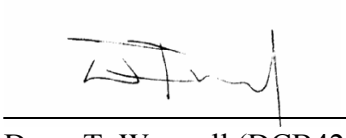
6. Conclusion

> The Telecommunications Act of 1996 runs some one hundred pages. The Act's ostensible purpose is to open markets to competition and to deregulate them. It may eventually have that effect. The process of deregulating, however, seems to require more regulation than ever.[64]

ITTA urges the Commission to protect the IP-based arena from the regulatory costs, delays, uncertainties, and inefficiencies plaguing still – after eight years – the legacy PSTN-based universe. True public interest regulation, addressing congressionally defined social policies, can easily be accommodated without adverse effects upon IP markets. Economic regulation cannot, and the attempt should not be made. If necessary to achieve congressional goals for competition and deregulation in the field of IP-enabled services, the Commission can and should exercise its preemption powers. This course will ensure that IP-based markets, having done quite well to date without regulatory intervention, can continue to prosper according to consumer preferences, rather than bureaucratic ones.

Respectfully submitted,

THE INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE



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[64] Peter Huber, *Law and Disorder in Cyberspace,* Oxford University Press (1997) at 3.